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IN THE

Supreme Court of the United States

October Term, 1966
No. 1189

MILTON LUROS; and LONDON PRESS, INC., a California corporation,

Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeal, Second Appellant District, State of California.

STANLEY FLEISHMAN,
1680 Vine Street,
Suite 700,
Los Angeles, Calif. 90028,
Counsel for Petitioners.

SAM ROSENWEIN,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	4
Statement of the Case	4
How Federal Questions Are Presented	7
Reasons for Granting the Writ	11
Conclusion	18

INDEX TO APPENDICES

Appendix A. Judgment and Order of the Court of Appeal, Second Appellate District, State of California	1
Appendix B. Constitutional and Statutory Provisions Involved	2
Appendix C. Excerpt From the Opinion of Honorable Kenneth Holland	6

TABLE OF AUTHORITIES CITED

Cases	Page
A Book etc. v. Attorney General of Massachusetts, 383 U.S. 413	13
American Railway Express Co. v. Levee, 263 U.S. 19	2
Austin v. Kentucky, Oct. Term 1966, No. 16	15
Baumgartner v. United States, 322 U.S. 665	14
Freedman v. Maryland, 380 U.S. 51	12
Garner v. Louisiana, 368 U.S. 157	12
Greenberg v. Superior Court, 19 Cal. 2d 319, 121 P. 2d 713	6
Hartzel v. United States, 322 U.S. 680	14
Herndon v. Lowry, 301 U.S. 242	14
Jacobellis v. Ohio, 378 U.S. 184	11
Jensen v. Superior Court, 96 Cal. App. 2d 112, 214 P. 2d 828	6
Keegan v. United States, 325 U.S. 478	14
Kotteakos v. United States, 328 U.S. 750	16
Krulewitch v. United States, 336 U.S. 440	16
Madruga v. Superior Court, 346 U.S. 556	2
Manual Enterprises, Inc. v. Day, 370 U.S. 478	14
Marcus v. Search Warrants of Property, 367 U.S. 717	16
New York Times Co. v. Sullivan, 376 U.S. 254	12, 13, 14, 15
People v. Aday, 226 Cal. App. 2d 520	8
People v. Bantam Books, Inc., 172 N.Y.S. 2d 515	17
People v. Zentner, et al., No. 297456	8

Page

Quantity of Copies of Books v. Kansas, 378 U.S. 205 16

Redrup v. New York, Oct. Term 1966, No. 3 15

Smith v. California, 361 U.S. 147, 80 S. Ct. 215, 4 L. Ed. 2d 205 ..... 14, 15, 16

Speiser v. Randall, 357 U.S. 513 ..... 12, 15

Stoner v. California, 376 U.S. 483 2

Thompson v. Louisville, 362 U.S. 199 12

Tot v. United States, 319 U.S. 463 ..... 13, 15, 16

United States v. Klaw, 350 F. 2d 155 ..... 13, 17

United States v. Romano, 382 U.S. 136 13

Statutes

California Constitution, Art. I, Sec. 9 ..... 6, 10

California Constitution, Art. I, Sec. 11 10

California Constitution, Art. I, Sec. 13 ..... 6, 10

California Constitution, Art. I, Sec. 21 10

California Penal Code, Sec. 182(1) 4

California Penal Code, Sec. 311 4

California Penal Code, Sec. 311.2 ..... 4, 5

California Penal Code, Sec. 311(e) 13

California Penal Code, Sec. 938 6

California Penal Code, Sec. 938.1 ..... 4, 6

California Penal Code, Sec. 939.6 ..... 4, 5, 6

California Penal Code, Sec. 939.8 ..... 4, 5, 6

California Penal Code, Sec. 995 ..... 4, 5, 6, 7

California Penal Code, Sec. 996 6

Page

California Penal Code, Sec. 999a 4, 6, 10

California Penal Code, Sec. 1238(1) 6

United States Code, Title 28, Sec. 1257(3) 2

United States Constitution, First Amendment .....
.....2, 3, 4, 10, 11, 12, 14, 15, 17

United States Constitution, Fourteenth Amendment
.....2, 3, 4, 6, 10, 11, 14, 15, 17

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Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeal, Second Appellant District, State of California.

Petitioners pray that a writ of certiorari issue to review the judgment and order of the Court of Appeal, Second Appellate District, State of California, entered in the above-entitled case on November 28, 1966.

Opinions Below.

No opinion was delivered by the court below denying the relief sought by petitioners herein, and no opinion was delivered by the Supreme Court of the State of California thereafter denying a timely Petition for Hearing by petitioners.

Jurisdiction.

The judgment and order of the Court of Appeal, Second Appellate District, State of California [Appendix A] was dated and entered on November 28, 1966 [R. 44, 84].[1]

A due and timely Petition for Hearing in the Supreme Court of California [R. 45-86] was denied on December 28, 1966. The court below therefore became the highest court of the State in which a decision could be had. *Stoner v. California,* 376 U.S. 483; *American Railway Express Co. v. Levee,* 263 U.S. 19, 20-21.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3). See, *Madruga v. Superior Court,* 346 U.S. 556, 557, n.1.

Questions Presented.

Petitoner Luros is an officer of petitioner London Press, Inc., a California corporation. The essential charge made in an Indictment returned by a Grand Jury in the County of Los Angeles, State of California, was that these petitioners, as printers of certain named books, had conspired with the publishers of the said books to violate the state obscenity laws. The questions presented are as follows:

1. Whether, under the free speech and press and due process provisions of the First and Fourteenth

[1]For the convenience of the Court, petitioners have numbered the various documents contained in the certified record in consecutive order up to and including the Certificate of the Clerk of the court below [R. 94]. The Reporter's Transcript of Grand Jury Proceedings which follows thereafter is separately numbered and is designated hereinafter as "Tr". The last page of the certified record contains the Order of the Supreme Court of California denying the Petition for Hearing.

Amendments to the United States Constitution, petitioners can be compelled to answer the Indictment where no evidence was presented to the Grand Jury in support of the essential ingredients of the offense alleged in the said Indictment.

2. Whether, under the free speech and press and due process provisions of the First and Fourteenth Amendments to the United States Constitution, petitioners can be compelled to answer the Indictment where no evidence was presented to the Grand Jury that the books specified in the Indictment exceeded contemporary community standards in the depiction of sex and nudity, or appealed to the prurient interest, or were utterly without redeeming social importance.

3. Whether, under the free speech and press and due process provisions of the First and Fourteenth Amendments to the United States Constitution, petitioners can be compelled to answer the Indictment where no evidence was presented to the Grand Jury establishing that the petitioners knew that the books specified in the Indictment were obscene.

4. Whether, under the free speech and press and due process provisions of the First and Fourteenth Amendments to the United States Constitution, petitioners can be compelled to answer the Indictment where the books specified in the Indictment are not obscene and are entitled to constitutional protection.

5. Whether, under the free speech and press and due process provisions of the First and Fourteenth Amendments to the United States Constitution, petitioners can be compelled to answer the Indictment where the books specified in the Indictment were never read to the Grand Jury in their entirety, and the Grand Jury

was physically unable to read the books during the Grand Jury sessions.

6. Whether, under the free speech and press and due process provisions of the First and Fourteenth Amendments to the United States Constitution, petitioners can be compelled to answer the Indictment where no evidence was presented to the Grand Jury of the existence of the alleged conspiracy or petitioners' alleged participation therein.

7. Whether the procedures used by the State to obtain the Indictment against these petitioners abridge the exercise of freedoms of speech and press and deprive petitioners of their liberty and property without due process of law contrary to the provisions of the First and Fourteenth Amendments to the United States Constitution.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First and Fourteenth Amendments to the United States Constitution, and the pertinent provisions of §§182(1), 311, 311.2, 938.1, 939.6, 939.8, 995 and 999a of the California Penal Code are set forth in Appendix B hereto.

Statement of the Case.

On the 30th day of June, 1966, the Grand Jury of the County of Los Angeles returned an Indictment [R. 16-22] against petitioners and other named defendants, charging petitioners and the other named defendants with the crime of conspiracy to violate §311.2 of the California Penal Code in violation of §182(1) of the California Penal Code.

The aforesaid Indictment alleged that for a period of two years prior to the finding of the Indictment, petitioners and the other named defendants wilfully, unlawfully and feloniously conspired to violate §311.2 of the Penal Code, in that they did wilfully, unlawfully and knowingly and with intent to distribute, prepare, publish and distribute four allegedly obscene books, to wit, *Seed of the Beast, Queer Daddy, The Experimenters* and *Just for Kicks.* The fourteen overt acts set forth in the Indictment made no mention of petitioner London Press, Inc.; and as to petitioner Luros the overt acts merely alleged that manuscripts for the named books were delivered to said petitioner for printing; that said petitioner printed the said books and distributed the said books in the County of Los Angeles.

The aforesaid Indictment was returned and filed in said Superior Court of the State of California for the County of Los Angeles, and filed in the office of the Clerk of said Court on June 30, 1966 [R. 2, 16]. By motion due and timely made, and heard on November 7, 1966, petitioners moved the Superior Court, the Honorable Herbert V. Walker, Judge Presiding, in Department 101 thereof, to set aside the aforesaid Indictment pursuant to §995 of the California Penal Code [R. 4].

The grounds of the aforesaid motion were that the Indictment was not found as prescribed in the California Penal Code provisions affecting the conduct of investigation by the Grand Jury, particularly §§939.6 and 939.8 of the Penal Code; that each of these petitioners had been indicted without reasonable or probable cause; that the Indictment was based upon no legal evidence, and without any evidence, to support the essential ingredients of the offense charged in the Indict-

ment against petitioners; and that a trial under the said Indictment against petitioners would, for the aforesaid reasons, be contrary to law and the free speech and press and due process provisions of Article I, §§9 and 13 of the California Constitution and the provisions of the Fourteenth Amendment to the United States Constitution [R. 4].

The motion to set aside the Indictment upon the aforesaid grounds was based upon the Indictment; the Reporter's Transcript of Proceedings before the Grand Jury held on June 14, 15, 16, 21, 22 and 30, 1966 [Tr. 1-326]; and upon all the records, filed, papers and proceedings theretofore had.[2]

On November 7, 1966, respondent Superior Court and the Presiding Judge thereof made an Order deny-

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[2]California does not preserve the secrecy of grand jury proceedings once the indictment has been returned. The reporter must transcribe his notes in all cases in which an indictment is voted. Penal Code §938. The defendant is then entitled to a copy of the transcript. Penal Code §938.1. The grand jury may receive none but legal evidence (Penal Code §939.6), and an indictment may be returned only when all the evidence, if unexplained or uncontradicted, would, in the judgment of the grand jury, warrant a conviction by a trial jury (Penal Code §939.8). If an indictment is returned without reasonable or probable cause, the court, on motion of the accused, must set it aside. Penal Code §995. If the §995 motion is not made prior to trial, the defendant is precluded from afterwards objecting on the aforesaid grounds. Penal Code §996. In the event the motion to set aside the indictment under Penal Code §995 is denied, the accused may obtain immediate review by the appellate courts in prohibition proceedings. Penal Code §999a. In the event the motion is granted, the People may immediately appeal from the order setting aside the indictment. Penal Code §1238(1). These independent proceedings are intended to protect "the right of a person to be free from prosecution for crime" (*Greenberg v. Superior Court*, 19 Cal. 2d 319, 121 P. 2d 713, 715 [1942]) and "the ordeal, ignominy and expense of a trial" (*Jensen v. Superior Court*, 96 Cal. App. 2d 112, 214 P. 2d 828, 832 [1950]).

ing the motion to set aside the Indictment pursuant to Penal Code §995 [R. 6, 23]. No written opinion was rendered by the said Court.

The motion to set aside the Indictment having been denied by the Presiding Judge of respondent Superior Court, as aforestated, the case against petitioners was set down for trial setting by the said Superior Court on December 5, 1966 in Department 100 thereof [R. 6-7]. Whereupon, on November 17, 1966, petitioners duly and timely filed a Petition for a Writ of Prohibition in the Court of Appeal, Second Appellate District, State of California [R. 1-25].

On November 28, 1966, the said Court of Appeal, Second Appellate District, denied the said Petition for a Writ of Prohibition, without opinion [Appendix A; R. 44, 84].

A timely Petition for Hearing was filed in the Supreme Court of the State of California [R. 45-86], and denied on December 28, 1966.

How Federal Questions Are Presented.

No statutory or constitutional standards of any kind were ever given or explained to the Grand Jury before the return of the Indictment herein, as the Transcript of Proceedings makes clear [Tr. 1-326]. No evidence was presented to the Grand Jury that the books named in the Indictment go substantially beyond customary limits of candor in description or representation of matters pertaining to sex, nudity, or excretion; or that the predominant appeal of each of the books is to a prurient interest; or that the said books are utterly without redeeming social importance. The prosecution

did introduce into evidence a book entitled *Sex Life of a Cop* [Ex. 14, Tr. 16, 236], and the Grand Jury was advised that in a case entitled *People v. Aday,* 226 Cal. App. 2d 520, the appellate court had stated that the said book *Sex Life of a Cop* was probably obscene. No basis was laid in the record for any comparison between the said book *Sex Life of a Cop* and the books herein involved, and the record does not show that the Grand Jury ever read said book or that said book was ever found to be obscene.[8] Thus, the prosecution made no competent proof of contemporary community standards in the depiction of sex, nudity or excretion, or any competent proof that the books charged in the Indictment exceeded contemporary standards in the depiction of such matters. No attempt was made by the prosecution to prove that the books appeal to prurient interest, or are utterly without redeeming social importance.

No evidence was offered by the prosecution to show that petitioners, charged essentially with the printing of the books, knew that the books named in the Indictment were obscene as alleged. A former employee of a corporation, Parliament News, testified that on one occasion she heard petitioner Luros and his wife discussing one of the books named in the Indictment, but the witness testified she was not able to hear exactly what was being said [Tr. 239, 244-245]. On the issue of scienter, the record with respect to petitioners is

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[8]On November 4, 1966, the Honorable Kenneth Holland, a Judge of the Superior Court for the State of California for the County of Los Angeles, in a case entitled *People v. Zentner, et al.,* No. 297456, unreported, held that the book *Sex Life of a Cop* "could not possibly be held to be obscene on the limits of candor test under California law". The pertinent excerpt of the opinion of Judge Holland is annexed hereto as Appendix C.

therefore completely barren of any evidence to support findings in reason of guilty knowledge and unlawful intent.

On the issue of conspiracy, not only was there an absence of proof of guilty knowledge and specific unlawful intent, but the evidence shows only that petitioner Luros is an officer of petitioner London Press, Inc., and that petitioner London Press, Inc. merely printed and distributed the said books at the request of the other defendants named in the Indictment. The evidence in the record shows that all the transactions between petitioners and the other defendants named in the Indictment were in the usual course of business and in all respects in accordance with the usages and practices common in the printing and distributing of books on behalf of a publisher. There was no evidence that petitioner Luros physically printed the books nor, as heretofore stated, that said petitioner knew the contents of the writings or knew that the books were obscene, as alleged in the Indictment.

The books named in the Indictment were never read to the members of the Grand Jury, and there is no evidence in the record to establish that the members of the Grand Jury read the books named in the Indictment. The prosecutor, at the very last moment of the hearing [Tr. 321], asked the Foreman to indicate if the Grand Jury had read the four books named in the Indictment and the so-called comparison book, and the Foreman merely replied "yes". An examination of the schedule of the days and hours the Grand Jury convened to consider the evidence presented to it demonstrates that the members of the Grand Jury were physically unable to read the books named in the Indictment.

or the alleged comparison book, and the record is barren of any proof that they did.

In their Petition for a Writ of Prohibition filed with the court below, petitioners, and each of them, averred, and they do now aver, that they have not committed the offense charged in the Indictment and that they are innocent of any said offense, and that they at all times acted lawfully and within constitutionally protected areas of conduct and speech and press.

Based upon all the aforesaid, petitioners prayed in their Petition for a Writ of Prohibition that the respondent Superior Court be restrained from taking any further proceedings or steps, including trial in the case against them. The petitioners alleged that compulsion to stand trial under the Indictment, without legal competent evidence in support thereof, would be contrary to law and the free speech and press, due process and equal protection provisions of Article I, §§9, 11, 13 and 21 of the California Constitution and the First and Fourteenth Amendments to the United States Constitution.

It was also alleged in the Petition for a Writ of Prohibition that said Petition was filed with the Court of Appeal, Second Appellate District, pursuant to the provisions of §999a of the California Penal Code, no appeal lying from the Order of the respondent Superior Court denying the motion to set aside the Indictment and petitioners having no other plain, speedy or adequate remedy at law.

In their Petition for Hearing to the California Supreme Court [R. 45-86], petitioners renewed their constitutional claims, alleging that compulsion to stand

trial under the Indictment under the circumstances here presented would violate the free speech and press and due process provisions of the First and Fourteenth Amendments to the United States Constitution and the applicable provisions of the California Constitution.

Reasons for Granting the Writ.

1. The decisions of this Court have made it clear that the standards for judging obscenity require, "in the first instance", a finding that the material "goes substantially beyond customary limits of candor" in description or representation of sex, nudity or excretion. *Jacobellis v. Ohio,* 378 U.S. 184. If writings do not go beyond customary freedom of expression, this Court has stated that there can be no official inquiry into the other elements of the offense, such as prurient appeal or social importance.

In short, the proof must show initially, by clear, unequivocal evidence, that the particular books involved substantially exceed contemporary community standards. This requires proof as to what those standards are and proof that the specific books named in the Indictment exceed those standards. The proof presented by the prosecution may be oral or documentary, but there must be proof before a finding can be made. In the proceedings herein, the prosecution made no attempt to present such proof.

In the light of the decided cases, the Indictment against petitioners cannot be sustained because the first element of the offense was not proven. Moreover, it is undisputed that the prosecution made no attempt to prove that the books appeal to the prurient interest of

the average person or are utterly without redeeming social importance. Since there was no proof of the alleged obscenity of the books and since, as a matter of independent constitutional judgment the books are not obscene and are entitled to constitutional protection, the Indictment herein was constitutionally infirm and it was violative of the free speech and press and due process provisions of the Constitution to require petitioners to plead thereto. *Thompson v. Louisville*, 362 U.S. 199; *Garner v. Louisiana*, 368 U.S. 157.

In the ordinary criminal proceeding, there must be some competent evidence presented in support of each essential element of the offense charged. In criminal proceedings involving obscenity, not only must there be competent evidence to support each essential element of the offense but, because of the First Amendment requirements, that evidence must appear in the record with clarity. This is a burden placed on the State because the very initiation of a criminal proceeding against books acts as a deterrent to the circulation of such books and, if these books are constitutionally protected, the community is deprived of access to material which the First Amendment guarantees. Thus, the burden of proving that a book is unprotected expression rests on the State from the very inception of any criminal proceeding, and this burden must be met with clear, convincing and unequivocal evidence. As this Court stated in *Speiser v. Randall*, 357 U.S. 513, 526, "[w]here the transcendent value of speech is involved, due process certainly requires . . . that the State bear the burden of persuasion to show that the appellants engaged in criminal speech". See, *Freedman v. Maryland*, 380 U.S. 51; *New York Times Co. v. Sullivan*, 376 U.S. 254.

Books and writings do not in themselves prove such elements as contemporary standards, prurient interest or social importance. Whether a book exceeds limits of candor, or appeals to a shameful or morbid interest in sex, or is utterly worthless, can only be established by evidence and not by conjectures, presumptions or subjective reactions. *Tot v. United States,* 319 U.S. 463; *New York Times Co. v. Sullivan,* 376 U.S. 254; *United States v. Romano,* 382 U.S. 136. See also, *A Book etc. v. Attorney General of Massachusetts,* 383 U.S. 413; *United States v. Klaw,* 350 F. 2d 155 (2 Cir. 1965).

2. There is no offense under the California obscenity law, and persons cannot be charged with conspiring to commit such an offense, unless the record establishes that the accused knew that the named material was obscene. California Penal Code §311(e).

All that the evidence shows at most is that petitioner Luros is an officer of petitioner London Press, Inc., and that petitioner London Press, Inc. printed and distributed at the request of the other defendants named in the Indictment the books named in the Indictment. The evidence shows that all the transactions between petitioner London Press, Inc. and the other defendants were in the usual course of business and in all respects in accordance with the usages and practices common in the printing and distributing of books on behalf of a publisher. There is no evidence that petitioner Luros physically printed the books.

Since an obscenity prosecution involves free speech and press provisions under the Federal and State Constitutions, the standards for judging the necessary proof are much higher and stricter. This Court has held that

the broad protections of freedoms of speech and press would be seriously endangered if guilty knowledge and unlawful intent were to be predicated on mere surmisal or conjecture without any proof in the record. *Smith v. California,* 361 U.S. 147; *Manual Enterprises, Inc. v. Day,* 370 U.S. 478. See also, *New York Times Co. v. Sullivan,* 376 U.S. 254; *Hartzel v. United States,* 322 U.S. 680; *Keegan v. United States,* 325 U.S. 478; *Herndon v. Lowry,* 301 U.S. 242; *Baumgartner v. United States,* 322 U.S. 665.

The aforesaid decisions establish that the standards and criteria for judging scienter are governed by the demands of the free speech and press provisions of the First and Fourteenth Amendments. This Court has emphasized that the definition of "obscenity" is limited to material which goes substantially beyond customary limits of candor in the description of matters pertaining to sex and nudity; and appeals to prurient interest; and is utterly without redeeming social importance, and that no criminal proceeding can be sustained if the proof does not show that the accused *knew* that these elements of the offense existed.

In *Smith v. California,* this Court held that proof of scienter is constitutionally *required* in any obscenity proceeding. It was held that without a requirement of proof of guilty knowledge, criminal prosecutions in obscenity cases would tend to restrict the exercise of freedoms of speech and press because a self-censorship would be compelled, which would ultimately result in denying the community access to constitutionally protected material. This Court also observed in *Smith v. California* that if a requirement of guilty knowledge is eliminated or diluted, an obscenity statute becomes unconstitution-

ally vague and violates the procedural and substantive provisions of the First and Fourteenth Amendments.

In *New York Times Co. v. Sullivan,* this Court stated that "a defense for an erroneous statement honestly made is no less essential here than was the requirement of proof of guilty knowledge which in *Smith v. California,* 361 U.S. 147, 80 S. Ct. 215, 4 L. Ed. 2d 205, we held indispensable to a valid conviction of a bookseller for possessing obscene writings for sale" (376 U.S. at 278).

In short, this Court has held that an inference of guilty knowledge and unlawful intent cannot be drawn merely from proof that a book was printed or distributed. Such an inference is irrational and unreasonable, and opens the door capriciously for arbitrary charges against innocent persons. In this area, it is particularly important that the record contain substantial evidence of guilty knowledge and unlawful intent. Without such evidence, the criminal proceedings are constitutionally void, in violation of the due process and free speech provisions of the First and Fourteenth Amendments. *Speiser v. Randall,* 357 U.S. 513; *Tot v. United States,* 319 U.S. 463.[4]

3. It is established law that mere association does not make a conspiracy, and that there must be some evidence in a record before criminal liability may be imposed on the basis of conspiracy. To uphold the Indictment herein against petitioners upon the theory of a conspiracy without evidence and with proof only of normal business relations is to sanction an indictment

[4]A similar issue is before this Court in *Redrup v. New York,* Oct. Term 1966, No. 3 and *Austin v. Kentucky,* Oct. Term 1966, No. 16.

founded on mere speculation or conjecture. *Kotteakos v. United States,* 328 U.S. 750, 773; *Krulewitch v. United States,* 336 U.S. 440, 445-446. See also, *Tot v. United States,* 319 U.S. 463.

If printers may be charged with the inherently vague concept of "conspiracy" with no more proof than the fact that the writings involved were circulated in the ordinary course of business transactions, then such action by the State can only serve as a deterrent to the circulation of all books and other writings dealing with sex. The use of the "conspiracy" weapon in the obscenity area can only tend to create a self-censorship which will ultimately result in depriving the community to access of constitutionally protected material. This Court has warned against the use of any ordinary state criminal procedures which tend to restrict the dissemination of constitutionally protected material under the guise of enforcing criminal law provisions against allegedly obscene writings. *Smith v. California,* 361 U.S. 147; *Marcus v. Search Warrants of Property,* 367 U.S. 717; *Quantity of Copies of Books v. Kansas,* 378 U.S. 205.

4. It is of course clear from the record that the books named in the Indictment were never read to the Grand Jury. The ambiguous question and answer contained at the conclusion of the hearings with respect to the books are not in themselves competent evidence to support a finding that the books were read in their entirety as the law requires. There was before the Grand Jury only one copy of the book *Seed of the Beast;* one copy of the book *The Experimenters* and two copies of the other two books named in the Indictment, and *Sex Life of a Cop.* Making every assumption with respect

to the time spent by the Grand Jury, and considering the fact that the Grand Jury heard 38 witnesses and received for consideration over 70 exhibits, it is plain that it was physically impossible for the grand jurors to read the books in question while the Grand Jury was in session. It would have taken, at the very least, at least 44 hours of constant reading, without interruption, for each member of the Grand Jury to read all of the five books, including *Sex Life of a Cop*. Since at the most the Grand Jury sat for approximately 17 hours in these proceedings, it is plain that the Grand Jury was unable to read the books merely to determine their contents, wholly apart from the issues of proof of contemporary community standards, appeal to prurient interest and social importance. Moreover, without statutory standards by which to govern their determination, the Grand Jury was simply left to place the imprimitur of approval upon the Indictment without evidence in support thereof. *United States v. Klaw,* 350 F. 2d 155 (2 Cir. 1965); *People v. Bantam Books, Inc.,* 172 N.Y.S. 2d 515 (N.Y. Co. Ct., 1958).

5. Since there was no evidence presented to the Grand Jury in support of the essential elements of the charge contained in the Indictment, compulsion to stand trial under such an Indictment in an obscenity proceeding constitutes a violation of both the free speech and press and due process provisions of the First and Fourteenth Amendments to the United States Constitution. The procedures leading to the return of the Indictment are clearly constitutionally deficient, and since the proceedings below were infected with violations of the free speech and press and due process provisions of the Constitution, the judgment and order of the court be-

low should be reversed, with instructions to grant petitioners appropriate relief.

Conclusion.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

STANLEY FLEISHMAN,
Counsel for Petitioners.

SAM ROSENWEIN,
Of Counsel.